A Shield Does Not Fall in *Hazelwood*: Privileging the Legitimate Journalism of High School Student Reporters

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INTRODUCTION

After fifteen-year-old Audrie Pott hanged herself, student reporters on her high school's newspaper began investigating the circumstances leading up to the tragedy.[1] The newspaper staff at Saratoga High School conducted over fifty interviews regarding Audrie's sexual assault and the photos of her attack that classmates had circulated before her suicide.[2] After weeks of research, three reporters published their findings on April 14, 2013, in an article involving five anonymous student sources.[3] In August, when the three student reporters went back to school for the first day of a new academic year, they found subpoenas waiting for them.[4] The subpoenas required them to name the confidential sources in their article.[5] The reporters chose to protect the names of their confidential student sources,[6] for whom exposure could carry harsh social, disciplinary and legal ramifications.[7]

The Saratoga High School student reporters argued that they had a "reporter's

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1. *Reports: 3 Teens Admit Assaulting NorCal Girl Who Later Killed Herself*, CBSNEWS (Jan. 16, 2014, 5:27 AM), http://perma.cc/UKX4-A56A.

2. Natasha Vargas-Cooper, *A Party, a Sexual Assault, and a Suicide: Was 15-Year-Old Audrie Pott Cyberbullied to Death?*, BUZZFEED (May 24, 2013, 10:46 AM), http://perma.cc/T9TW-BL77.

3. Sabrina Chen, Cristina Curcelli & Samuel Liu, *Sources Say that "Around 10 Students" Saw Illicit Photos of Audrie Pott*, SARATOGA FALCON, Apr. 14, 2013, http://perma.cc/6AEU-63GQ.

4. To make matters worse for the student reporters, they did not personally receive the subpoenas until the first day of the fall semester—the day that compliance was due—because the subpoenas were sent to the school. Telephone Interview with Frank LoMonte, Exec. Dir., Student Press Law Ctr., at 22:27–26:55 (Nov. 7, 2013) [hereinafter Telephone Interview with Frank LoMonte]. The Student Press Law Center advises student reporters and school newspapers on their legal rights, and represented the Saratoga High School student reporters when they received their subpoenas in August 2013. *Id.* at 24:30–24:56.

5. Natasha Vargas-Cooper, *High School Journalists Successfully Test Shield Law in Cyberbullying Suicide Case*, BUZZFEED (Aug. 29, 2013, 8:18 PM), http://perma.cc/8GP2-G8UN.

6. *Id.* (quoting one of the reporters, who said that he and his colleagues did not want to "destroy [their] journalistic integrity by giving up [their] confidential sources").

7. The Student Press Law Center has found that high school student reporters need to give out promises of anonymity much more frequently than their professional counterparts, in light of concerns about school disciplinary actions or psychologically damaging social ostracism. Telephone Interview with Frank LoMonte, *supra* note 4, at 22:27–26:55.

privilege" based in the First Amendment and state statutes.[8] When applicable, the reporter's privilege shields journalists from compelled disclosure of sources and notes.[9] So far, only a handful of district courts have considered the availability or strength of a reporter's privilege for student reporters, and none have looked at the reporter's privilege in the context of high school student reporters.[10] Robert Allard, the lawyer who requested the subpoenas, has withdrawn them for now, so the reporter's privilege issue was not adjudicated.[11] Despite the lack of case law, the reporter's privilege is a relevant issue for high school student reporters. Between four to six college students each year receive subpoenas for their work on student newspapers, and high school student reporters are almost never subpoenaed in relation to their newsgathering.[12] But when high school student reporters are subpoenaed, as the Saratoga High School students' subpoenas demonstrated, the legal and emotional implications are grave. The Saratoga High School students were "scared out of [their] mind[s]" when they received the subpoenas, and understandably so.[13] High school student reporters, like their professional counterparts, can be punished for contempt of court for failure to reveal sources pursuant to a subpoena.[14] Unlike professional reporters, however, student reporters lack the legal and political clout to defend themselves.[15] Civil or criminal sanctions could spell the end of a student reporter's college and professional dreams.[16] Their greater vulnerability makes legal protection more imperative for high school reporters than for their professional counterparts.[17]

8. *See* Vargas-Cooper, *supra* note 5.

9. *The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://perma.cc/8EEN-F6UX (last visited Oct. 18, 2014) [hereinafter *The Reporter's Privilege Compendium*].

10. Persky v. Yeshiva Univ., No. 01 Civ. 5278(LMM), 2002 WL 31769704 (S.D.N.Y. Dec. 10, 2002) (applying privilege to undergraduate journalist); Blum v. Schlegel, 150 F.R.D. 42, 43 (W.D.N.Y. 1993) (applying privilege to law school student).

11. *See* Vargas-Cooper, *supra* note 5 ("[The Pott family's lawyer] warned in an email that he and the Pott family may revisit the matter after the students graduate in June.").

12. Telephone Interview with Frank LoMonte, *supra* note 4, at 56:32–56:55.

13. Vargas-Cooper, *supra* note 5 (quoting one of the reporters).

14. Minors can be held in contempt absent independent criminal charges. *See* Juvenile Contempt Cases, Wash. Defender Ass'n, http://perma.cc/SK9W-WGT2 (last visited Oct. 20, 2014).

15. *See* Jeffrey G. Sherman, Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. C.R.-C.L. L. REV. 119, 129–30 (1970) (voicing concern that barring the reporter's privilege from all persons except those who work for established news sources overprotects news sources that are likely able to defend themselves through political processes).

16. Students, by and large, do not enter the courtroom with an impressive professional résumé. Judith Miller, the *New York Times* journalist who was jailed after being found in contempt for refusing to disclose a source, already had an illustrious professional career behind her. *See* Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1. She continued to receive work in journalism after she got out of jail. Although she retired from the *Times* and lost some of her former credibility, she continued to edit magazines and was hired as a television news commentator. *See Biography*, JUDITHMILLER.COM, http://perma.cc/A25G-8REK (last visited Nov. 5, 2014) (describing Miller's post-*New York Times* career); Rory O'Connor, *Less Credible than Judith Miller*, ALTERNET (June 5, 2006), http://perma.cc/EH4H-D83U (describing Miller as "the much-maligned ex-*New York Times* reporter Judith Miller").

17. Without the reporter's privilege, student reporters' lack of experience, combined with the above-mentioned legal and educational consequences, *see supra* note 7, makes them more vulnerable to

This Note focuses on the applicability of a First Amendment reporter's privilege for high school student reporters. In Part I, this Note provides a brief overview of the current First Amendment reporter's privilege jurisprudence. Most, but not all, jurisdictions recognize some form of a First Amendment reporter's privilege. Generally speaking, in jurisdictions that recognize a First Amendment reporter's privilege, judges are much more likely to quash subpoenas for traditional newsgatherers—"a person who is a full-time employee of a daily newspaper"[18]—than for non-traditional newsgatherers.[19]

Parts II and III explore the special circumstances that could jeopardize a high school student reporter's claim to First Amendment privilege. Two main differences between student and traditional press might lead a court to categorically exclude student reporters from coverage. First, the student reporter is not a full-time employee of the institutional press. Although many other non-traditional newsgatherers have successfully claimed the privilege, courts and lawmakers in some jurisdictions have attempted to exclude "leakers" by defining privileged persons in ways that could also categorically exclude student journalists.[20] Second, a student reporter gathers news as part of her high school education. In the student press context, the Supreme Court has used the "educational purpose" argument to justify a narrowing of students' First Amendment protection against pre-publication censorship.[21]

Parts II and III then argue that high school students should not be categorically excluded from a First Amendment reporter's privilege. Instead, the First Amendment should provide the same reporter's privilege for a student reporter as it would for a professional reporter. In Part IV, this Note recommends that states adopt shield laws that allow students to qualify for journalistic privilege over their professional-level news reporting, which would reinforce student reporters' First Amendment protections.

I. IS THERE A FIRST AMENDMENT EVIDENTIARY PRIVILEGE FOR REPORTERS?

The First Amendment of the Constitution, as incorporated through the Fourteenth Amendment, prohibits the federal and state governments from abridging the freedom of the press.[22] Government censorship is just one way to undermine a

self-censorship. *See* STUDENT PRESS LAW CTR., ENGAGING FOR CHANGE: ANNUAL REPORT 2012–13, at 2 (2013), *available at* http://perma.cc/4DLY-DJXU.

18. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5426 (2013).

19. *See, e.g.*, *In re* Madden, 151 F.3d 125, 130 (3d Cir. 1998) ("As we see it, the privilege is available only to those persons whose purposes are those traditionally inherent to the press.").

20. Whether and to what extent the First Amendment protects bloggers is beyond the scope of this Note. For more on the blogger's privilege, see Ronald D. Coleman, *Bloggers, Journalists, Reporting, and Privilege*, N.Y. ST. B.A. J., Nov./Dec. 2013, at 18.

21. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

22. U.S. CONST. amend. I; *see* Near v. Minnesota, 283 U.S. 697, 722–23 (1931) (applying the First Amendment Free Press Clause to states).

free press: any commandeering of press resources threatens the freedom of the press.[23] The trust between journalists and their sources is an invaluable press resource.[24] Sources give reporters superior access to newsworthy information when they trust reporters to exercise journalistic ethics, and, moreover, when they trust that the information they give reporters will not be readily available to the government.[25] Proponents of the reporter's privilege argue that court-ordered disclosures erode the sources' trust in the press, amplify the journalists' professional risks and reduce the public's access to information.[26]

Recognizing the public interest in an autonomous press but reconciling it with individuals' duty to testify in court, many jurisdictions offer reporters a *qualified* reporter's privilege,[27] based in the First Amendment,[28] state shield laws[29] or the common law.[30] Given the importance of the reporter's privilege to the press' function and independence, a reporter's privilege based in the First Amendment Free Press Clause might seem like a foregone conclusion.[31] In reality, some

23. "[T]he press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant." Mitchell v. Superior Court, 690 P.2d 625, 628 (Cal. 1984) (en banc).

24. Gonzales v. NBC, 194 F.3d 29, 33–36 (2d Cir. 1999) (finding that "the public policy favoring the free *flow of information to the public*" necessitates especially strong protection of confidential sources).

25. *See* MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 465–66 (8th ed. 2011) (detailing the theoretical underpinnings of a First Amendment reporter's privilege).

26. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (holding that the First Amendment does not bar a plaintiff from recovering damages for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information); *see also Gonzales*, 194 F.3d at 33, 34 (although finding a narrower press interest in non-confidential information, emphasizing the "foundation of the privilege" is "the public policy favoring the free flow of information to the public"); *The Reporter's Privilege Compendium*, *supra* note 9 (arguing the importance of privileging reporters' confidential sources and notes).

27. *See, e.g.*, Von Bulow *ex rel.* Auersperg v. Von Bulow, 811 F.2d 136, 145 (2d Cir. 1987); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) (finding that a First Amendment reporter's privilege applied unless the subpoenaed information was crucial to the case and could not be obtained from any other source).

28. After *Branzburg v. Hayes*, 408 U.S. 665 (1972), some federal courts have covered non-traditional journalists using a federal common law privilege instead of clearly stating that they are applying a First Amendment-based privilege. *See, e.g.*, Blum v. Schlegel, 150 F.R.D. 42, 45 (W.D.N.Y. 1993) (finding that law school journalist qualifies for protection under federal common law, even if non-professional status could bar protection under New York state law).

29. FRANKLIN ET AL., *supra* note 25, at 451. This Note focuses on the constitutional privilege. State statutes are discussed in Part III, *infra*, as an additional layer of protection for high school student journalists.

30. State common law privilege is beyond the scope of this Note. Briefly, state common law privilege is largely redundant given that all but two federal circuits have recognized either a federal common law privilege or a privilege rooted in the First Amendment. *See The Reporter's Privilege Compendium*, *supra* note 9.

31. *Part-Time Reporter Finds Himself Unlikely Journalism Hero*, FIRST AMEND. CTR. (July 4, 2004), http://perma.cc/9GST-AW9W ("Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, argues that forcing a journalist to reveal sources to benefit one party in a lawsuit would jeopardize the perceived independence of the media. And it could have a chilling effect on other people's willingness to speak.").

jurisdictions have declined to find a reporter's privilege in the First Amendment.[32] Even the jurisdictions that recognize a First Amendment reporter's privilege do not privilege all instances of "newsgathering" or all persons who "report news."[33] The parameters of the privilege are perilously unclear, leading to sobering consequences for journalists who relied on, but ultimately fell outside of, the privilege's coverage.[34]

It would not be unfair to blame the Supreme Court for the lack of clarity in the First Amendment reporter's privilege jurisprudence. The high court has only ruled once on the evidentiary privilege, generating the fractured decision in *Branzburg v. Hayes*.[35] The 1972 case involved three reporters who fought federal grand jury subpoenas for their confidential sources and notes by claiming a First Amendment privilege.[36] The four justices in the plurality found that the press did not have any "First Amendment privilege to refuse to answer the relevant and material questions asked during a good faith grand jury investigation."[37] At the other extreme, Justice Douglas argued that the press had an *absolute* privilege against court-ordered disclosure.[38] Splitting the difference, Justice Stewart and two other dissenting justices found a *qualified* First Amendment reporter's privilege that can be defeated if the subpoenaing party: (1) demonstrates a reasonable belief that the information is "clearly relevant to a specific probable violation of law"; (2) establishes a "compelling interest" in the information and (3) shows that the information could not be obtained by means "less destructive" to First Amendment rights.[39]

Though concurring with the plurality in result, Justice Powell agreed with Justice Stewart that the First Amendment provides a qualified reporter's privilege. Justice Powell's concurrence called for a "case-by-case" analysis whereby courts must strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[40] Justice Powell found that a journalist has "access to the court on a motion to quash" if he believes that he is being compelled to disclose "information bearing only a remote and tenuous relationship to the subject of the investigation, or . . . his testimony implicates confidential source relationships without a legitimate need of law

32. *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) (holding that reporter's privilege applied only where allowed by state law).

33. *See* Jason M. Shepard, *Bloggers After the Shield: Defining Journalism in Privilege Law*, 1 J. MEDIA L. & ETHICS 186, 187 (2006) ("[J]ail sentences for journalists who refuse to turn over newsgathering material to federal law enforcement investigators have become longer and more frequent in recent years.").

34. *See id.* at 186 (discussing blogger Josh Wolf's 226-day detention, freelance writer Vanessa Leggett's 168-day detention and *New York Times* editor Judith Miller's 85 days in jail for contempt).

35. Branzburg v. Hayes, 408 U.S. 665 (1972).

36. *Id.* at 667–77.

37. *Id.* at 708.

38. *Id.* at 712–13 (Douglas, J., dissenting) (noting that the public interest balancing had already been done by those who wrote the Bill of Rights, who cast "the First Amendment in absolute terms" to "repudiate[] the timid, watered-down, emasculated versions of the First Amendment which both the Government and the [press] advance in the case").

39. *Id.* at 743 (Stewart, J., dissenting) (footnotes omitted).

40. *Id.* at 710 (Powell, J., concurring).

enforcement."[41]

After *Branzburg*, the Supreme Court washed its hands of the reporter's privilege and left lower courts to fend for themselves.[42] A few courts have adhered to the *Branzburg* plurality.[43] Through what critics call "creative[] counting," however, most jurisdictions have fashioned a qualified First Amendment reporter's privilege from *Branzburg*'s concurrence and dissents.[44] While reporters do not enjoy absolute protection against court-ordered disclosure in these jurisdictions,[45] a qualified privilege can still deter courts, prosecutors and litigants from hijacking investigative journalism.[46]

II. STUDENT REPORTERS HAVE AS MUCH ENTITLEMENT TO A FIRST AMENDMENT PRIVILEGE AS THEIR PROFESSIONAL COUNTERPARTS

Arguing against a reporter's privilege for the Saratoga High School student reporters, Mr. Allard claimed that "student reporters do not qualify as legitimate journalists because they are not professionally employed by a news gathering organization."[47] A First Amendment reporter's privilege that covers more than the traditional institutional press has been an alarming thought for many judges. *Branzburg* only involved the institutional press,[48] but the plurality refused to carve out a reporter's privilege in part because defining the coverage of such a privilege "would present practical and conceptual difficulties of a high order."[49] Justice

41. *Id.* at 709–10.

42. *See* Tom Isler, Comment, Chevron Corp. v. Berlinger *and the Future of the Journalists' Privilege for Documentary Filmmakers*, 160 U. PENN. L. REV. 865, 871 (2012) (surveying reporter's privilege jurisprudence post-*Branzburg*).

43. *See, e.g.*, *In re* Grand Jury Proceedings, 810 F.2d 580, 586 (6th Cir. 1987) (following the *Branzburg* plurality and holding that the privilege applied only where allowed by state law); *see also* WRIGHT & GRAHAM, *supra* note 18 (surveying the aftermath of *Branzburg* and noting that years after *Branzburg*, the Sixth Circuit in *In re Grand Jury Proceedings* was the first appellate court to follow the *Branzburg* plurality).

44. Stephen I. Vladeck, *Democratic Competence, Constitutional Disorder, and the Freedom of the Press*, 87 WASH. L. REV. 529, 541 (2012); *see, e.g.*, N.Y. Times Co. v. Gonzales, 459 F.3d 160, 174 (2d Cir. 2006) (applying the test from Justice Powell's *Branzburg* concurrence and finding that First Amendment privilege applied); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) (finding that First Amendment reporter's privilege applied unless the subpoenaed information was crucial to the case and could not be obtained from any other source).

45. In a decision that was released just two months after *Branzburg*, the Second Circuit refused to extend *Branzburg*'s plurality to civil cases. Baker v. F & F Inv., 470 F.2d 778, 782–83 (2d Cir. 1972) (reading *Branzburg* as denying *absolute* reporter's privilege but preserving *qualified* privilege when disclosure would threaten "the freedom of the press and the public's need to be informed").

46. *See* FRANKLIN ET AL., *supra* note 29, at 465–66; *see also* Gonzales v. NBC, 194 F. 3d 29, 33 (2d Cir. 1999) (mentioning with approval the "Justice Department Guidelines discouraging any attempt to subpoena the press to appear before grand juries, and stipulating that all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press").

47. Vargas-Cooper, *supra* note 5.

48. The case involved reporters employed by the *New York Times*, the Louisville *Courier-Journal* and a Massachusetts television station. Branzburg v. Hayes, 408 U.S. 665, 667–79 (1972).

49. *Id.* at 704.

White, writing for the plurality, was especially wary of potential exploitation of the reporter's privilege by "sham newsmen."[50] While some proponents of the reporter's privilege have scoffed at the idea of "sham newsmen," most would agree with Justice White that the coverage question is "the most difficult question in formulating the privilege."[51]

Few courts have considered whether student reporters fall within the coverage of the privilege,[52] and none have looked at the coverage of the privilege in the context of high school student reporters. However, shielding high school student reporters would be a reasonable application of the First Amendment reporter's privilege. Outside of the reporter's privilege context, the Supreme Court has emphasized the broad range of works that First Amendment-protected "press" encompasses.[53] Consistent with a broad definition of "press," courts have found the reporter's privilege available to a variety of non-traditional newsgatherers, including freelance reporters,[54] authors,[55] academics,[56] investment analysts,[57] a credit rating agency,[58] a nonprofit law group,[59] a publisher of indices and price ranges for the natural gas

50. *Id.* at 705 n.40 (expressing fear that the reporter's "privilege might be claimed by groups that set up newspapers in order to engage in criminal activity").

51. Some commentators have questioned whether Justice White's "sham newsmen" exist outside of "law school examinations." WRIGHT & GRAHAM, *supra* note 18. For those commentators, even if sham newsmen did exist, they "become a threat only if the [reporter's] privilege is made absolute." *Id.*

52. Persky v. Yeshiva Univ., No. 01 Civ. 5278(LMM), 2002 WL 31769704, at *2 (S.D.N.Y. Dec. 10, 2002) (applying reporter's privilege to an undergraduate journalist); *see also* Blum v. Schlegel, 150 F.R.D. 42, 43 (W.D.N.Y. 1993) (applying reporter's privilege to a law school student).

53. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends *every sort of publication* which affords a vehicle of information and opinion."). For an example of a case that relies on the *Lovell* interpretation of "press," see *CFTC v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 31–32 (D.D.C. 2005).

54. *See, e.g.*, United States v. Lindh, 210 F. Supp.2d 780, 783 (E.D. Va. 2002) (holding that a freelance writer covering Afghanistan for CNN could assert reporter's privilege).

55. *See, e.g.*, Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) (extending reporter's privilege protection to the authors of books).

56. *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 714–15 (1st Cir. 1998) (extending reporter's privilege to cover the pre-publication manuscripts of a professor). *But see In re* Request from the U.K. Pursuant to the Treaty Between the Gov't of the U.S. & the Gov't of the U.K. on Mutual Assistance in Criminal Matters in the Matter of Dolours Price, 685 F.3d 1, 20–21 (1st Cir. 2012) (Torruella, J., concurring in the judgment only) (characterizing the majority opinion as disregarding *Cusumano* to the extent that it protects academics). Notably, the Ninth Circuit has explicitly denied protection to academics. Scarce v. United States, 5 F.3d 397, 402–03 (9th Cir. 1993).

57. Summit Tech., Inc. v. Healthcare Capital Grp., Inc., 141 F.R.D. 381, 384 (D. Mass. 1992) ("Whether or not [an investment analyst] is a member of the 'organized press' per se, it appears that he is engaged in the dissemination of investigative information to the investing business community . . . [and] is entitled to raise the claim of privilege with respect to his confidential source as would any other media reporter.").

58. *In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 368–70 (E.D. Pa. 1992) (finding that Standard & Poor's qualified for reporter's privilege because of intent to disseminate information for the public good); *see also* Geer v. Cox, No. 01-2583-JAR, 2003 WL 549042, at *2 (D. Kan. Feb. 19, 2003) (denying journalist's privilege for financial shareholders over a confidentially-obtained subscriber list because the shareholders lacked intent to disseminate).

59. Southwell v. S. Poverty Law Ctr., 949 F. Supp. 1303, 1314–15 (W.D. Mich. 1996) (finding that reporter's privilege barred disclosure of confidential sources in a nonprofit law group's newsletter).

market[60] and documentary filmmakers.[61] In some jurisdictions, however, the current definition of a privileged reporter is likely to categorically exclude high school student reporters, even though the definition would certainly cover professional reporters.[62]

The goals that underlie the First Amendment's protection of a free press do not justify differentiating protection for student reporters and protection for reporters who are "professionally employed by a news gathering organization."[63] Instead, First Amendment canon has emphasized the importance of protecting the wide variety of players that constitute the American "press."[64] Student reporters are not "professionally employed by a news gathering organization," but many of them are conducting newsgathering that closely resembles the work of professional reporters. The student press serves the same First Amendment goals as the traditional institutional press, and student reporters deserve the same privilege as their professional counterparts.

A. HIGH SCHOOL STUDENT REPORTERS ARE DEFINED OUT OF THE PRIVILEGE IN SOME JURISDICTIONS

Among the jurisdictions that recognize a First Amendment reporter's privilege, the most widely accepted definition of a privileged reporter is an individual who can demonstrate "the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process."[65] The Second Circuit first developed the "intent" test in 1987.[66] The First, Third and Ninth Circuits have since adopted similar tests.[67]

60. *See, e.g.*, CFTC v. McGraw-Hill Cos., Inc., 390 F. Supp. 2d 27, 32 (D.D.C. 2005) (granting reporter's privilege to the publisher of a price index, and noting that the difficulty of defining "journalist" militates in favor of a broad construction of the term).

61. *See* Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977) (noting that defendant, a documentary filmmaker, was not a traditional news source; but unwilling to find "that the fact that [filmmaker] is not a salaried newspaper reporter of itself acts to deprive him of the right to seek protective relief"); *In re* McCray, Richardson, Santana, Wisem & Salaam Litig., 928 F. Supp. 2d 748, 751 (S.D.N.Y. 2013) (finding reporter's privilege for the makers of a documentary on New York City's "Central Park Five" litigation). *But see* Chevron Corp. v. Berlinger, 629 F.3d 297, 307–09 (2d Cir. 2011) (affirming the district court's reading of an editorial independence requirement into *Von Bulow*, and holding that a documentary filmmaker did not qualify for First Amendment-based reporter's privilege because the filmmaker did not prove that he gathered the information with sufficient independence).

62. *See, e.g.*, FLA. STAT. ANN. § 90.5015 (2014) (defining the coverage of the state shield law to include only salaried journalists and paid independent contractors).

63. Vargas-Cooper, *supra* note 5.

64. *See, e.g.*, VIRGINIA HOUSE OF DELEGATES, REPORT OF 1799 (1799) [hereinafter REPORT OF 1799], *available at* http://perma.cc/JL5C-2ZR9 ("It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits.").

65. Von Bulow *ex rel.* Auersperg v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987); *see Guide Compare Tool: Comparing: IV. Who is Covered*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://perma.cc/V823-UTXH (last visited Nov. 8, 2014) (summarizing definition of journalist across jurisdictions).

66. *Von Bulow*, 811 F.2d at 144 (finding that the privilege would apply to a book author who

The D.C. Circuit has not officially adopted the "intent" test, but a number of D.C. district courts have applied some version of the test.[68]

In "intent" jurisdictions, high school student reporters' lack of professional employment would not bar them from a reporter's privilege. High school student reporters should fall under the coverage of the reporter's privilege as long as they can demonstrate intent to use the subpoenaed material "to disseminate information to the public and that such intent existed at the inception of the newsgathering process."[69] The fact that student reporters gather news as part of their educations presents a bigger problem for coverage. High school student reporters are usually enrolled in a journalism class that teaches writing and awards grades for the students' work on the school newspaper. A court might bar a student reporter from the privilege if it found that the reporter began newsgathering with educational intent rather than intent of public dissemination. "Intent" jurisdictions have not required public dissemination to be the *only* intent of protected newsgathering, but some have required claimants of First Amendment-based privilege to demonstrate a *primary* intent to "engage[] in investigative reporting [and] gathering news."[70] The Third Circuit found that a sports commentator was not entitled to a First Amendment-based privilege over his public announcements on wrestling since "his announcements [we]re as much entertainment as journalism."[71] Reading the Third Circuit's "intent" test narrowly, a court might conclude that a student reporter had the primary intent to learn writing skills rather that to disseminate information to the public.

Although a narrow formulation of the "intent" test can be detrimental to the privilege claims of student reporters, the federal courts' definitions of privileged persons do not explicitly exclude students. By contrast, shield laws in some states erect a concrete obstacle to a First Amendment privilege for students.[72] Under Federal Rule of Evidence 501, Congress has instructed that, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the

began gathering the subpoenaed information with intent of public dissemination).

67. *See, e.g.*, Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998) (citing *Von Bulow* and applying the "intent" test); *In re* Madden, 151 F.3d 125, 130 (3d Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1294 (9th Cir. 1993).

68. *See, e.g.*, CFTC v. McGraw-Hill Cos., 390 F. Supp. 2d 27, 32 (D.D.C. 2005) (finding that the reporter's privilege applied to a publisher of daily and biweekly price indices, because even though the reporter "may not be involved in what is most commonly considered traditional news gathering, the privilege applies to a broad range of news gatherers"); Tripp v. Dep't of Defense, 284 F. Supp. 2d 50, 57–58 (D.D.C. 2003) (summarizing district court decisions). The Seventh Circuit has focused on statutory rather than First Amendment privilege. *See, e.g.*, Desai v. Hersh, 954 F.2d 1408, 1411 n.3 (7th Cir. 1992) (finding that the privilege applied to a book author under Illinois's reporter shield law). The existence and coverage of a First Amendment privilege is less clear in the Fourth, Fifth, Sixth, Eighth and Tenth Circuits.

69. *Von Bulow*, 811 F.2d at 144.

70. *In re Madden*, 151 F.3d at 130.

71. *Id.* at 126.

72. David Greene, *Senate Revises Media Shield Law for the Better, But It's Still Imperfect*, ELEC. FRONTIER FOUND. (Sept. 20, 2013), http://perma.cc/FY9N-LNAY. Forty-nine states and the District of Columbia recognize journalistic privilege, and forty states currently have shield laws. *It's Time to Raise the Shield!*, SOC'Y OF PROF. JOURNALISTS, http://perma.cc/V3Y4-5QQE (last visited Nov. 8, 2014).

rule of decision."[73] Furthermore, a federal court may rely on state definitions of privileged persons if the federal definitions do not clearly delineate coverage.[74]

While some states' shield laws offer broad protection,[75] others define privileged journalists in ways that are decidedly unfavorable to high school reporters.[76] For example, Delaware's shield law is only applicable to journalists who earn their "principal livelihood" through reporting, or who have spent four of the preceding eight weeks working over twenty hours per week "in the practice of, obtaining or preparing information for dissemination."[77] Florida limits coverage to persons who "regularly" engage in newsgathering "for gain or livelihood" while working as a salaried employee or contractor for an established media entity.[78] High school student reporters do not work regular hours on school newspapers or receive payment for their work. Consequently, they are categorically disqualified from statutory protection in states that define coverage based on hours and salary.[79]

High school students who seek a federal privilege will face the greatest challenge in a state that has "a fairly comprehensive legislation that enumerates college journalists by name," but explicitly leaves out high school students.[80] Frank LoMonte, Executive Director of the Student Press Law Center, expressed his apprehension about a high school student reporter's privilege in Maryland, under whose shield law: "The judge wouldn't be barred from reading the First Amendment" to cover high school student reporters, but "you wonder whether a judge would be willing to extend a constitutional privilege to people who were explicitly left out of statutory privilege."[81] While journalists who have been

73. FED. R. EVID. 501; *see also* WRIGHT & GRAHAM, *supra* note 18 (discussing interpretation of Rule 501, which invites federal judges to create federal common law privilege, but mandates that they recognize state-delineated privilege in civil cases). For a fairly complete summary of cases that have looked at the interstices of constitutional and statutory privilege through Rule 501, see *Desai v. Hersh*, 954 F.2d 1408, 1411 (7th Cir. 1992).

74. A First Amendment-based privilege is not clearly established in all federal circuits, so, if clearer definitions exist in state statutes, a federal court might look to state definitions out of respect for the states. *See, e.g.*, *Desai*, 954 F.2d at 1411 (expressing reluctance to extend a constitutional privilege where definition of privileged persons in state legislation has expressly excluded persons in claimant's situation).

75. *See, e.g.*, MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (2013); OR. REV. STAT. §§ 44.510–44.540 (2014). Montana's Media Confidentiality Act extends protection to persons "connected with" a newsgathering organization as long as the privileged information was collected within the person's duties as a newsperson. MONT. CODE ANN. § 26-1-902 (2013). Oregon offers a similar statutory definition, extending reporter's privilege to persons "connected with" a "medium of communication," broadly defining the latter phrase. OR. REV. STAT. § 44.520(1) (2014).

76. For a comprehensive, state-by-state survey of existing shield laws, see *State-by-State Guide to the Reporter's Privilege for Student Media*, STUDENT PRESS LAW CTR. (2010), http://perma.cc/7TN5-VGU5 [hereinafter *State-by-State Guide*]. For a detailed examination of different legislative approaches on defining the reporter's privilege, see Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

77. DEL. CODE ANN. tit. 10, §§ 4320–4326 (2014).

78. FLA. STAT. ANN. § 90.5015 (2014) (explicitly excluding "[b]ook authors and others who are not professional [salaried or contractor] journalists" from statutory protection).

79. *See State-by-State Guide*, *supra* note 76.

80. Telephone Interview with Frank LoMonte, *supra* note 4, at 53:19–54:27.

81. Maryland's statute employs a tiered definition of "journalist." Tier one is narrow, requiring *employment* with a news media. MD. CTS. & JUD. PROC. CODE ANN. § 9-112(b)(1), (2) (2014). Tier

defined out of state shield laws have successfully invoked federal privilege,[82] exclusion from a state's definition of privileged reporters can impact a judge's determination on the availability of a federal privilege. To a court, Maryland's exclusion of high school students could appear to be proof that the state legislature "has expressed its will that a certain class of people not be covered."[83] If so, the court has compelling federalism and separation of powers reasons against finding a federal privilege.[84]

B. STUDENT REPORTERS DESERVE THE SAME FIRST AMENDMENT PRIVILEGE AS TRADITIONAL REPORTERS

If a student newspaper offers a public vehicle of information and opinion, and undertakes the same kind of newsgathering processes as traditional institutional press, then there is no valid reason to disqualify the reporters on the student newspaper from a First Amendment reporter's privilege where members of the traditional institutional press would be privileged.[85] Many courts have recited the Supreme Court's directive in *Lovell v. City of Griffin* that the First Amendment press "comprehends *every sort of publication* which affords a vehicle of information and opinion."[86] Whether under this broad construction of "press" or a narrower, merit-based construction, the First Amendment reporter's privilege should be as available to members of the high school student press as it would be to members of the professional press.[87]

two carves out an exception for students enrolled "in an institution of *postsecondary* education and engaged in any news gathering or news disseminating capacity recognized by the institution as a scholastic activity or in conjunction with an activity sponsored, funded, managed or supervised by school staff or faculty." *Id.* § 9-112(b)(3) (emphasis added). The explicit recognition of college newspaper writers weighs against a liberal construction of tier one's "employment" requirement, presenting a problem for their high school counterparts. Telephone Interview with Frank LoMonte, *supra* note 4, at 77:07–77:35.

82. *See* Blum v. Schlegel, 150 F.R.D. 42, 43 (W.D.N.Y. 1993) (finding that law school student journalist's non-professional status excluded the student from New York's shield law, but applying federal reporter's privilege nonetheless).

83. Telephone Interview with Frank LoMonte, *supra* note 4, at 77:07–77:35.

84. *Id.* ("[A] judge would be naturally disinclined to go against the express will of the [state] legislature.").

85. *See, e.g.*, Von Bulow *ex rel.* Auersperg v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987) ("Although prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination, it is not the sine qua non. The burden indeed may be sustained by one who is a novice in the field.").

86. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (emphasis added).

87. In a hearing held by the Committee on the Judiciary, Chip Berlet, co-founder of the College Press Services testified on the apparent exclusion of college journalists from the then-proposed federal journalist shield bill. *Newsmen's Privilege: Hearing on H.R. 717 Before Subcommittee No. 3 of the Committee on the Judiciary*, 93d Cong. 450 (1973) [hereinafter *Hearing on H.R. 717*], *available at* http://perma.cc/KGD4-TVK2 (statement of Chip Berlet, Washington Bureau Chief, College Press Services) ("I think [high school journalists] are real journalists. They are young, but they are doing the same job as the person 20 years older, and often doing it better."); *see also* Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799, 811 (E.D. Mich. 2004) (regarding a student reporter's article on pollution, finding no "significant disparity in quality between [the student reporter's] article in the [high school paper] and the similar articles in 'professional' newspapers").

Today's high school newspapers can look a lot like professional newspapers. For a taste, flip through Saratoga High School's student newspaper, the *Falcon*. A staff of over sixty students—including the three reporters threatened with subpoenas—write, edit and produce a twenty-page broadsheet newspaper and a regularly updated news website.[88] The *Saratoga Falcon* is just one of many impressive newspapers produced by high school students around the United States. In 2010, when the Columbia Scholastic Press Association (CSPA) selected the *Falcon* for two Golden Crown Awards,[89] the CSPA also selected 157 of the *Falcon*'s peer student publications for honors from a pool of 1556 qualifying applicants.[90] In 2011, when the National Scholastic Press Association (NSPA) nominated the *Falcon* as a Pacemaker Award finalist in the category of best broadsheet newspapers of over seventeen pages,[91] the NSPA nominated seventy high school news sources, including print newspapers, news magazines and news broadcasts.[92]

The reporters on school newspapers conduct investigative journalism that closely models the newsgathering work of traditional journalists, albeit on topics that are of particular interest to high school students, teachers and parents. Among the *Falcon* staff's recent news stories are research-driven pieces that delve into the influence of financial aid on college selection,[93] alert classmates to glitches in the College Board's application site[94] and uncover the plight of bullying victims.[95] The school's journalism advisors and the paper's student editors enforce quality and professionalism standards for the rest of the staff, mirroring editorial

88. *See* Vargas-Cooper, *supra* note 5.

89. Saratoga High School's student newspaper has consistently been recognized by the CSPA for its reporting. *See* David Eng & Tiffany Tung, *Falcon to Receive National Award*, SARATOGA FALCON, Jan. 26, 2010, http://perma.cc/MQP5-L8TA; Kavya Nagarajan & Andy Tsao, *Saratoga Falcon Nominated for Crown Award*, SARATOGA FALCON, Jan. 26, 2009, *available at* http://perma.cc/UN9V-SPTR.

90. *Gold Circle Awards*, COLUM. UNIV., http://perma.cc/Q7W8-AJ6A (last visited Nov. 2, 2014). Besides the Crown Awards, CSPA has awarded the Gold Circle to high school students for thirty-one years and accepts submissions across 201 categories of journalism. Last year, the CSPA received 15,000 submissions for the award and extended 1200 Gold Circles. *Id.*

91. *See* Evaline Ju, *Newspaper Nominated for National Award*, SARATOGA FALCON, Sept. 24, 2011, http://perma.cc/Y8NN-9EUV.

92. *2011 NSPA Newspaper Pacemaker Winners*, NAT'L SCHOLASTIC PRESS ASS'N, http://perma.cc/2MET-2UEY (last visited Nov. 25, 2014); *NSPA Awards Week Day 3: Newspaper and Broadcast Pacemaker*, NAT'L SCHOLASTIC PRESS ASS'N NEWS & NOTES BLOG (Sept. 8, 2011), http://perma.cc/QZN9-R6TJ. The NSPA gives out awards twice annually at conferences. *NSPA Announces 2013 Pacemaker Winners*, NAT'L SCHOLASTIC PRESS ASS'N NEWS & NOTES BLOG (Nov. 20, 2013), http://perma.cc/6T6N-WAKN. The Fall 2013 convention saw 5500 student journalists in attendance and 2938 applicants for "individual awards." *Id.* Of those applicants, 233 received individual awards for their strong newsgathering, reporting, editorial, design decisions and other areas of accomplishment. *Id.*

93. Nupur Maheshwari & Vibha Seshadri, *Scholarship Options Can Lead to Difficult Choices*, SARATOGA FALCON, Nov. 22, 2013, http://perma.cc/9DMY-9ZHF. For a glimpse into the time and effort that students and schools pour into their newspapers, see Ju, *supra* note 92.

94. Nick Chow & Jonathan Young, *Glitches in Common App Site Compound Students' Stress*, SARATOGA FALCON, Nov. 22, 2013, http://perma.cc/8PXG-SYMF.

95. Samuel Liu, *Culture of Judgement*, SARATOGA FALCON, Dec. 13, 2013, http://perma.cc/HAL8-WB6G.

hierarchies in the institutional press.[96] Whereas salary, reputation and job-advancement considerations incentivize professional journalists to uphold journalistic standards, student reporters are incentivized to do well in their journalism classes by reputation, grades and recommendation letters for college and internship applications. Student reporters will have to meet even higher requirements for coverage and writing if the school newspaper participates in competitions that are sponsored and judged by professional news organizations, since these competitions require "in-depth reporting"—the paramount aspiration of traditional journalism.[97]

Considering the similarities between high school and professional journalism, and given the range of other non-traditional journalists who have qualified for the First Amendment reporter's privilege, is it fair to categorically exclude student reporters from a privilege that would apply to their professional counterparts? The canons of the First Amendment do not support such a distinction.[98] James Madison, the drafter of the First Amendment, argued for strong First Amendment protection of all varieties of press publications.[99] A broad protection of press outlets encourages the proliferation of information channels, which keeps citizens well informed and gives the government access to their opinions.[100] Under Madison's theory of the First Amendment, protecting the student press is just as important as protecting the professional press, if not more so. As an information channel, the student press serves a community that is largely underserved by professional newspapers.[101] Student reporters keep teachers, students and students' families informed about current events and social issues that are important to their community.[102] Although the readership of a typical high school newspaper might not be as wide-reaching as that of some professional newspapers, student newspapers provide an important platform to amplify the voices of students, teachers and parents, some of whom would not otherwise gain access to press outlets.[103]

96. Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J.L. & EDUC. 609 (2011) (discussing the censorship of student press when schools retaliate against high school journalism advisers, emphasizing the important role that these advisers play in ensuring the quality and independence of the student press).

97. *See NSPA Announces 2013 Pacemaker Winners*, NAT'L SCHOLASTIC PRESS ASS'N NEWS & NOTES BLOG (Nov. 20, 2013), http://perma.cc/6T6N-WAKN. The NSPA has awarded "Pacemakers" every year since 1927 to "recognize, connect and educate the next generation of journalists." *Id.*

98. WRIGHT & GRAHAM, *supra* note 18 ("Attempts to limit the privilege to reporters for 'establishment' newspapers have been attacked as unconstitutional . . . ."); *see also Hearing on H.R. 717*, *supra* note 87 ("I think if a person is acting as a news person, then they are indeed a news person and should be considered as such, regardless of age, sex, or race. I think to define [news person] may be a breach of the first amendment.").

99. *See* REPORT OF 1799, *supra* note 64. In his *Abrams* dissent, Justice Holmes famously rejected the prosecution of four socialists and anarchists for distribution of leaflets on First Amendment grounds. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that a "free trade" in ideas would act as "the best test of truth" for that idea).

100. *See generally* REPORT OF 1799, *supra* note 64.

101. *See generally* STUDENT PRESS LAW CTR., *supra* note 17.

102. *See* Telephone Interview with Frank LoMonte, *supra* note 4, at 33:38–33:58.

103. *See id.* at 33:58–35:18 (describing professional news sites and Internet news communities

In the last few years, the main pushback against broad coverage under the reporter's privilege has centered around whether blogs qualify as legitimate press outlets.[104] Mr. LoMonte lamented that student reporters have become "collateral damage" of judicial and legislative efforts to eject amateur bloggers and national security leakers from the reporter's privilege.[105] High school student reporters rarely report on crimes, let alone national security secrets.[106] The fear that privileging non-traditional newsgatherers would allow irresponsible news providers to publish high-stakes state secrets, then, seems particularly irrelevant in the high school journalism context.[107] As a news outlet, high school newspapers resemble the core First Amendment press much more than blogs. High school newspapers take significant effort and time to cultivate. At 133 years old, the Williston Northampton School's *Willistonian* is the oldest high school newspaper in the country.[108] Fifty years ago, the *Saratoga Falcon* was already in print, run by a staff that included future director Steven Spielberg.[109] Where official high school newspapers are involved, judges would have no need to suspect a sham news

such as Patch.com, which frequently re-run articles that originated in high school newspapers).

104. *See, e.g.*, Obsidian Fin. Grp., LLC v. Cox, No. 3:11-cv-57-HZ, 2012 WL 1065484, at *13 (D. Or. Mar. 27, 2012) (refusing to "expand the Oregon Legislature's admittedly broad definition of '[m]edium of communication' to cover all communications made on the Internet"). *But see* Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184, 189 (N.H. 2010) (defining journalist to encompass bloggers and website curators, stating that "freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals").

105. Telephone Interview with Frank LoMonte, *supra* note 4, at 3:10–3:20; *see also* Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 386 (2006) ("[R]apid technological changes in both the nature and quantity of information regularly made available to the public suggest that a reporter's privilege may soon have to be considered a relic of a simpler era—a relic that now is neither workable or necessary."). In the Judith Miller case, *see supra* note 16, Judge Sentelle's much-cited concurrence nearly paraphrased Justice White's hypothetical "sham newsman" in *Branzburg*. Judge Sentelle feared that a privilege covering "the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web" would also protect "unlawful leaking" by the government official who gets an ally to "set up a web log" and interview him under a promise of confidentiality. *See, e.g.*, *In re* Grand Jury Subpoena to Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring). *See also Obsidian*, 2012 WL 1065484, at *13 (in order to exclude some "communications made on the Internet" from a privilege, holding that a qualifying reporter must possess a level of professionalism evinced by a journalism degree, association with a traditional news print or association with a television media outlet). *But see* Blumenthal v. Drudge, 186 F.R.D. 236, 244 (D.D.C. 1999) (finding that Matt Drudge, the creator and editor of a well-known news aggregation website, was eligible for a reporter's privilege).

106. *See* Telephone Interview with Frank LoMonte, *supra* note 4, at 26:40–30:33 (describing his interactions with the student press).

107. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 516–17 (2013) (while the government has implemented harsher leak laws due to increasing concerns about WikiLeaks and similar "revelation[s] of sensitive information to the public and to foreign adversaries," "[c]ivil libertarians have assailed the last two Administrations' 'war' on leaking and sought federal shield legislation for journalists and enhanced doctrinal protections for their sources").

108. *History of the* Willistonian, WILLISTONIAN, http://perma.cc/QQ44-Q367 (last visited Nov. 25, 2014).

109. Amy Lin & Sabrina Chen, *The Halls that Spielberg Walked, 50 Years Later*, Feb. 12, 2014, http://perma.cc/4SGF-LDC8.

outlet.[110]

Other influential theories of the First Amendment focus on the importance of producing courageous and engaged citizens who are committed to the project of self-government.[111] Examining these theories and applying them in a case that dramatically expanded press protections, the Supreme Court held that a legal regime that "dampens the vigor and limits the variety of public debate . . . is inconsistent with the First and Fourteenth Amendments."[112] If student reporters are categorically excluded from a reporter's privilege, they could be deterred from reporting on the kinds of stories that would expose them to court-ordered disclosures. In other words, categorical exclusion of student reporters increases the likelihood of reporter self-censorship that "is inconsistent with the First and Fourteenth Amendments."[113]

Categorical exclusion of student reporters also leads to self-censorship on the part of would-be informants. Reporters often hide the names of their whistleblower sources.[114] If whistleblowers do not have faith that a reporter can control the information she gathers, they are more likely to refrain from exposing governmental misconduct to the press and public.[115] Even when sources do come forward, they might limit the scope of the information that they share with reporters. In the student press context, reporters have yet another reason to protect their relationships with sources: "school media are often most students' first exposure to the press."[116] If students' "earliest perception of the media is that reporters cannot be trusted it is unlikely their views will change later."[117]

Privileging student reporters helps them inspire confidence in the independence of the press, and makes their peers more likely to provide information to the press in the future. Privileging student reporters promotes "a free, vigorous student press" that not only offers "a healthy ferment of ideas and opinions,"[118] but also serves as a check on the government.[119] Granted, student newspapers do not often

110. *See In re Miller*, 397 F.3d at 979–80 (Sentelle, J., concurring) (describing a sham news outlet that can be created in three minutes for the purposes of allowing a government agent to leak national security information).

111. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 296–97 & n.6 (1964) (Black, J., concurring) (citing Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

112. *Sullivan*, 376 U.S. at 279 (majority opinion).

113. *Id.*

114. *See* Telephone Interview with Frank LoMonte, *supra* note 4, at 26:40–30:33.

115. Lauren Kirchner, *Warnings from Whistleblowers Past*, COLUM. JOURNALISM REV. (Nov. 6, 2013, 2:50 PM), http://perma.cc/887J-W2RX.

116. *State-by-State Guide*, *supra* note 76.

117. *Id.*

118. JACK NELSON, CAPTIVE VOICES: THE REPORT OF THE COMMISSION OF INQUIRY INTO HIGH SCHOOL JOURNALISM (1974) ("Censorship is the fundamental cause of the triviality, innocuousness and uniformity that characterize the high school press.").

119. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J.

uncover federal or state governmental abuses, but they do frequently expose the wrongdoing of smaller scale governmental actors, such as schools and school boards. In *Dean v. Utica Community Schools*, for instance, high school junior Katy Dean investigated her school district's alleged wrongdoing after finding out that the school district was being sued for school bus pollutions that caused lung cancer.[120] The checking function of the First Amendment does not justify scaling protection for speech on the basis of the level of government that it checks, since small government is as prone to abuse as big government.[121]

Shielding high school reporters against subpoenas does not unduly impede the interests of justice.[122] Denying student reporters a reporter's privilege, on the other hand, creates negative repercussions for the future of the press. In their objections to proposed federal shield laws that would exclude student reporters from coverage, professional reporters have expressed their firm belief that the freedom of the high school press plays a critical role in shaping the future of the press.[123] Serving on school newspapers, students begin to develop the professional courage and internalize the professional ethics of journalism.[124] High school students participate in activities like the school newspaper to develop career interests and broaden career opportunities.[125] Many of today's high school journalists will become tomorrow's professional journalists. Giving high school students less protection for their newsgathering not only chills the vigor of the journalism they produce today, [126] but also breeds a habit of self-censorship that the student reporters will carry with them if and when they become professional journalists.[127]

521, 528 (1977).

120. Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799 (E.D. Mich. 2004).

121. James Madison, Speech to the U.S. House of Representatives, June 8, 1789, *excerpted in* Vincent Blasi, IDEAS OF THE FIRST AMENDMENT 200 (2d ed. 2012) (positing that state governments might be more likely to abuse their powers than federal government).

122. *Cf.* WRIGHT & GRAHAM, *supra* note 18 (describing the judicial and legislative pushback against a broad reporter's privilege that would include Internet bloggers).

123. *See, e.g.*, *Hearing on H.R. 717*, *supra* note 87, at 452; WRIGHT & GRAHAM, *supra* note 18.

124. "Where a free, vigorous student press does exist, there is a healthy ferment of ideas and opinions with no indication of disruption or negative side effects on the educational experience of the school." NELSON, *supra* note 118; *see also* David Abramowicz, Note, *Calculating the Public Interest in Protecting Journalists' Confidential Sources*, 108 COLUM. L. REV. 1949 (2008) (arguing that, in privilege cases, the determination of public interest should factor in journalistic values and journalistic ethics).

125. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 845 (2002) (Ginsburg, J., dissenting) ("Participation in [extracurricular] activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.").

126. *Cf.* NELSON, *supra* note118 (mentioning school censorship as a "fundamental cause of the triviality, innocuousness and uniformity that characterize the high school press").

127. College journalism professors believe that high school students "coming into our college programs . . . are completely unprepared for what journalism is about. They think it's OK to be told what to print and what not to print. They don't challenge authority like they should. We have to reprogram them." STUDENT PRESS LAW CTR., *supra* note 17, at 2 (quoting Prof. David Cuillier, Chair, Univ. of Ariz. Sch. of Journalism, Hazelwood Symposium, Univ. of N.C.–Chapel Hill, Nov. 2012).

III. *HAZELWOOD*'S "EDUCATIONAL PURPOSE" ARGUMENT DOES NOT ALLOW A NON-SCHOOL-AFFILIATED PARTY TO NARROW STUDENT FIRST AMENDMENT RIGHTS

Skeptics of a First Amendment reporter's privilege for high school student reporters may look to high school First Amendment speech cases to argue that the student press triggers inherently weaker First Amendment protections. Disputing the *Saratoga Falcon* reporters' eligibility for any reporter's privilege, Mr. Allard emphasized that the school paper does not constitute a vehicle for "information communication to the public," but is instead intended to "educate children."[128] His "educational purpose" argument echoed the majority opinion in *Hazelwood School District v. Kuhlmeier*, the Supreme Court's seminal high school newspaper case. The Court distinguished student press from traditional press based on the student press's educational purpose.[129] Even though the First Amendment normally protects journalists from pre-publication censorship by governmental actors, the *Hazelwood* Court allowed a public high school's principal to delete two pages of student-generated content from the school paper.[130]

The "educational purpose" argument in *Hazelwood* gives *school officials* an established basis to limit student reporters' exercise of their First Amendment rights. But it is far from clear that courts would allow non-school-affiliated parties to justify incursions on student rights under the "educational purpose" argument. No court has directly addressed a high school student's First Amendment rights against non-school-affiliated parties that attempt to access student works. Since *Hazelwood* and its progeny have only involved the school officials and students,[131] it is not clear whether *Hazelwood* stands for: (1) the limited First Amendment rights in works prepared for educational purposes[132] or (2) judicial deference to school officials' authority to implement educational purposes.[133] The way that a court interprets *Hazelwood* has significant bearing on whether subpoenaed student reporters would be protected by the First Amendment to the same extent as their non-student counterparts. If *Hazelwood* stands for the limited First Amendment rights in works prepared for "educational purposes," then a court might not

128. *See* Vargas-Cooper, *supra* note 5.

129. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988) (finding that the First Amendment did not protect a student reporter from pre-publication censorship because the school intended its paper as a "supervised learning experience for journalism students" and not as a forum for public expression). *But see* NELSON, *supra* note 118 (rebutting *Hazelwood*'s characterization of the student press).

130. *See Hazelwood*, 484 U.S. at 263.

131. *See* Dan V. Kozlowski, *Unchecked Deference:* Hazelwood*'s Too Broad and Too Loose Application in the Circuit Courts*, 3 U. BALT. J. MEDIA L. & ETHICS 1, 5 (2012) (summarizing circuit courts' applications of *Hazelwood* in the last two decades).

132. *Hazelwood*, 484 U.S. at 267 (holding that no public forum exists if the school has reserved its newspaper for non-public educational purposes).

133. *See* Kozlowski, *supra* note 131. The Supreme Court in *Hazelwood* conflated these two threads when it required subsequent courts to defer to the school's determination of whether its newspaper is a forum for limited educational use or for public discourse, even if the school did not communicate its determination in advance. *Hazelwood*, 484 U.S. at 267.

differentiate between school officials' and unaffiliated parties' authority to pierce students' First Amendment rights. On the other hand, if *Hazelwood* stands for the school's unique authority to implement educational purposes, then, against non-school-affiliated subpoenaing parties, student reporters have the same claim to whatever First Amendment privilege their non-student counterparts would receive.

The existing high school student speech cases weigh in favor of the interpretation that school officials enjoy special judicial deference in matters of education. Copyright cases offer more explicit corroboration that where a court might accept a school's educational purpose for restricting student rights, the "educational purpose" argument is largely unavailable for non-school-affiliated parties.[134] Considering the student speech and copyright cases, student reporters' First Amendment protections against non-school-affiliated subpoenaing parties should be equivalent to the First Amendment protections available to non-student reporters.

A. HIGH SCHOOL SPEECH CASES STAND FOR JUDICIAL DEFERENCE TO SCHOOLS' DETERMINATION OF EDUCATIONAL PURPOSE

Over the last century, federal courts have systematically narrowed the First Amendment rights of high school students. *Tinker v. Des Moines Independent Community School District* excluded "substantially disrupt[ive]" student speech from the First Amendment's protection.[135] *Morse v. Frederick* further excluded drug-related speech at "school-sponsored" functions.[136] *Hazelwood*, a particularly problematic decision, has allowed pre-publication censorship of student speech in school-sponsored forums.[137] Over the last two decades, courts have applied *Hazelwood* in many First Amendment cases outside of the pre-publication censorship context.[138] Lower courts have upheld school disciplinary actions punishing the off-campus speech of student bloggers.[139] Even so, *Hazelwood* and other high school student speech cases do not justify reducing or even eliminating the First Amendment reporter's privilege for student reporters. To argue that student reporters cannot claim a First Amendment reporter's privilege against

134. *See* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009) (acknowledging copyright in students' homework, but permitting school-designated affiliates to pierce student copyrights for educational purposes).

135. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969).

136. Morse v. Frederick, 551 U.S. 393 (2007) (holding that student poster with slogan "Bong Hits 4 Jesus" was not protected First Amendment speech).

137. Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech***,** 60 FLA. L. REV. 63 (2008).

138. *Id.* (highlighting two circuit-splits in cases that test: (1) the scope of *Hazelwood* and (2) whether *Hazelwood* means that the First Amendment allows schools' viewpoint discrimination of student speech, arguing that *Hazelwood* should not be the framework for in the second category of cases).

139. Doninger v. Niehoff, 642 F.3d 334, 344–45 (2d Cir. 2011) (declining to reach whether the First Amendment allows school officials to restrict a student's off-campus Internet speech, but granting the school officials qualified immunity because the law on First Amendment protections for student speech is not clearly established).

court-ordered disclosure because of the school newspaper's "educational purpose" is to ignore the special status of the school at the center of the high school First Amendment speech decisions.

The "educational purpose" of the student newspaper operated on two fronts in *Hazelwood*. First, it persuaded the Supreme Court to characterize the school paper as a special type of non-public forum, subject to school control over content.[140] Subsequent courts have disagreed over whether all school newspapers designed for student education should be characterized as non-public forums. In 2004, a Michigan federal court held that the high school's paper was a limited public forum rather than a non-public forum, and therefore the school principal could not ban a student from being published in the newspaper based on the content of her news story.[141] Whether a school newspaper is a public forum,[142] a limited public forum or a non-public forum affects the scope of students' First Amendment protection against pre-publication interference from the school, but does not diminish students' claim to post-publication protection from non-school-affiliated subpoenaing parties. In the words of the *Hazelwood* Court itself, the educational purpose of the student paper speaks to the "*educators' authority* over school sponsored publications."[143]

Second—and more importantly—the *Hazelwood* Court to deferred to the school's "legitimate pedagogical concerns" for regulating student speech.[144] Quoting its earlier decision in *Bethel School District v. Fraser*, a case involving lewd student speech at a school assembly, the *Hazelwood* Court reiterated that it "recognized that '[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' rather than with the federal courts."[145] The *Hazelwood* Court held that the First Amendment "require[s] judicial intervention to protect students' constitutional rights" only when a school can offer "no valid educational purpose" for censoring

140. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268 (1988) (declining to provide First Amendment protection from pre-publication censorship because school intended its paper as a "supervised learning experience for journalism students" and not as a forum for public expression); *id.* at 270 (deferring to the school board's policy, which provided that school-sponsored "publications are developed within the adopted curriculum and its *educational implications* in regular classroom activities" (emphasis added)). The non-public forum doctrine allowed the *Hazelwood* Court to find for the school without overturning its earlier decision in *Tinker*, 393 U.S. 503, 504, 513 (1969), where the Court found that a public high school violated students' First Amendment rights by suspending the students for wearing black armbands in protest of the Vietnam War.

141. Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799 (E.D. Mich. 2004) (distinguishing *Hazelwood* on the amount of control the school exercised over its paper; finding that school's censorship of a student reporter's article on bus pollution was a violation of the student's First Amendment rights).

142. Judges may deem a school publication a public forum only if "*school authorities* have by 'policy or by practice'" opened their publications for "indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Hazelwood*, 484 U.S. at 267 (emphasis added) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U. S. 37, 46 n.7, 47 (1983)).

143. *Id.* at 271 (emphasis added).

144. *Id.* at 273.

145. *Id*. at 267 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1984)). The directive that federal courts defer to public schools, which are largely state-run, could be explained in part by federalism concerns.

student press.[146]

Hazelwood does not explicitly give schools the authority to restrict the post-publication rights of student reporters, including students' right to an evidentiary privilege in court.[147] On the contrary, the *Hazelwood* Court stated that while "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . the government could not censor similar speech outside the school."[148] Some scholars have urged courts to turn away from *Hazelwood* when adjudicating cases such as content-based regulation of textbooks,[149] school regulation of students' off-campus speech[150] and regulation of non-students' in-school speech.[151] Assuming *arguendo* that *Hazelwood* does allow school officials to restrict student reporters' post-publication rights, *Hazelwood* would still be inapplicable to the actions of non-school-affiliated parties.[152] The Court's conclusion that "*school officials* may impose reasonable restrictions on the speech of students, teachers, and other members of the school community" supports the interpretation that a court-ordered disclosure violates students' First Amendment rights even if a school-ordered disclosure would not.[153]

Hazelwood and other high school speech cases have emphasized the special role of the "educator" and deferred to school officials' expertise in educational best practices.[154] Judges would neither give the same deference to parties unaffiliated with the school, nor permit such parties to encroach on students' First Amendment protections where a school could have justified similar encroachments based on "legitimate pedagogical concerns." Accordingly, the "educational purpose" argument is not available to non-school-affiliated parties that attempt to interfere with students' rights.

146. *Id.* at 273 (citations omitted) (internal quotation marks omitted).

147. Scholars, courts and members of the press have objected to the wide application of *Hazelwood*'s "legitimate pedagogical concerns" standard in subsequent school speech cases. *See, e.g.*, Kozlowski, *supra* note 131, at 1 ("Analysis shows that circuit courts have broadened *Hazelwood*'s scope and expansively interpreted the 'legitimate pedagogical concerns' standard, showing generally unchecked deference to schools."); *see also* Allison E. Hayes, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV 247 (2010).

148. *Hazelwood*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

149. *See generally* Waldman, *supra* note 138.

150. *See* Hayes, *supra* note 149.

151. *See id.*; *see also* Fleming v. Jefferson Cnty., 298 F.3d 918 (10th Cir. 2002) (applying *Hazelwood* to bar parents of several Columbine High School shooting victims from painting religious symbols on shooting memorial).

152. Whether school officials can compel disclosure is an interesting question that is beyond the scope of this Note. The Student Press Law Center has postulated that the school officials lack the authority to enforce compliance. *See Legal Protections for Journalists' Sources and Information*, STUDENT PRESS LAW CTR., http://perma.cc/3SGH-QJJ3 (last updated Nov. 21, 2014). Alternatively, the officials might encounter First Amendment and state statutory barriers. *Id.*

153. *Hazelwood*, 484 U.S. at 267 (emphasis added).

154. *See, e.g.*, Travis Miller, Note, Doninger v. Niehoff*: Taking* Tinker *Too Far*, 5 LIBERTY UNIV. L. REV. 303 (2011) (characterizing *Hazelwood* as allowing schools to demand higher standards of conduct for students that participate in extracurricular activities, and giving schools more deference as they uphold those standards).

B. ANALOGIZING TO COPYRIGHT PROTECTIONS FOR STUDENT WORKS

Contraction of student rights in high school First Amendment cases does not reflect any fundamental defect in students' rights in their writings, but instead reveals judicial deference to schools in matters of education. Copyright cases buttress this interpretation and paint a clearer picture of the relationships between schools, students and third parties. It is well established that student works are entitled to copyright protection,[155] whereas students' eligibility for reporter's privilege is in debate. Unless the alleged infringer can assert an affirmative defense such as fair use, copyright law would protect student and professional authors alike.[156] Recent copyright cases show that, for student and non-student works, schools and school-affiliates have an improved chance of qualifying for a fair use defense based on educational reasons. When asserted by non-school affiliated parties, however, the "educational purposes" argument is generally ineffective.

1. High School Student Works and Fair Use

The First Amendment consequences of an absolute monopoly on ideas and expression require copyrights to be qualified by fair use.[157] As is the case with many circuits' reporter's privilege analyses,[158] fair use analysis requires courts to weigh rights holder's and society's interests in deciding whether to permit a piercing of a rights holder's protection.[159] On a "case-by-case" basis, courts must determine fair use along four statutory factors.[160] Congress did not intend these factors to be exclusive, but in practice, courts have rarely considered factors outside of the list.[161] Moreover, courts tend to give two of the statutory factors greater weight: Factor one—the purpose and character of the unauthorized use, including

155. The copyright statute's protection "does include any work a student creates within the scope of any particular class s/he takes . . . . Using a student's work without permission involves copyright infringement." FRITZ DOLAK, BALL STATE UNIV. COPYRIGHT & INTELLECTUAL PROP. OFFICE, STUDENTS' RIGHTS IN COPYRIGHT (Nov. 2003), *available at* http://perma.cc/QC8L-239J.

156. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1993) ("The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990))).

157. In *Golan v. Holder*, 132 S. Ct. 873, 876 (2012), the Supreme Court held that "the 'idea/expression dichotomy' and the 'fair use' defense . . . serve as 'built-in First Amendment accommodations'" against a complete copyright monopoly.

158. *See* Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

159. 17 U.S.C. § 107 (2012); *see, e.g.*, Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Book Problem*, 27 BERKELEY TECH. L.J. 1379, 1414 (2012) ("The first and often most important question considered in fair use cases is whether the purpose of the defendant's use furthers core societal goals—such as learning, access to information, freedom of speech and expression, and innovation—or whether such use simply interferes with the rights of the copyright holder to exploit her rights in the work.").

160. 17 U.S.C. § 107; *Campbell*, 510 U.S. at 577.

161. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 564 (2008) (compiling all federal court fair use opinions from 1978–2005 and finding that 17% of courts considered factors outside the enumerated list, and 8.8% stated that a non-enumerated factor was relevant).

whether the use is "for *nonprofit educational purposes*"—and factor four—the impact of the unauthorized use on the right holder's economic interests in her copyright.[162] The way that courts have balanced factors one and four sheds light on who can successfully assert "educational purposes" to justify an intrusion on students' legal rights.[163]

The Fourth Circuit's decision in *A.V. ex rel. Vanderhye v. iParadigms* shows that courts allow unauthorized use of protected student works when schools authorized the alleged infringer to use such works for the school's educational purposes. In 2007, four high school students sued iParadigms—the parent company of Turnitin, a plagiarism detection service[164]—for copyright infringement.[165] Currently, 6500 middle and high schools worldwide are paying to license the service.[166] Turnitin asks students for consent before checking their work for plagiarism,[167] but a participating school can unilaterally decide to archive its students' submissions on Turnitin.[168] Turnitin archived many of the "over 110 million papers" in its student paper archive without obtaining express permission from student authors.[169] Some students and teachers have pushed back against

162. *See, e.g.*, Urban, *supra* note 159. The second and third factors describe the copyrighted work and the unauthorized use, respectively. Based on a statistical analysis on all reported federal fair use decisions between 2005 and 1978 (when fair use was codified), factors one and four are almost equally dispositive, but substantially more outcome-determinative than the other factors. Beebe, *supra* note 161 (finding that in 83.8% of decisions the outcome of factor four coincided with the decision, and in 81.5% of the time for factor one, but that factor two only agreed with the end result in 50.2% of opinions).

163. *See* H.R. REP. NO. 94-1476, at 66–72 (1976) (providing guidance on valid educational purpose under § 107). While it is true that transformative or educational purpose is to be considered by statutory mandate, there is no statutory mandate that courts give substantial weight to this factor as is done in practice. The importance of an educational interest in the eyes of the court can therefore be gleaned from this analysis.

164. A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 634 (4th Cir. 2009) ("When a school subscribes to iParadigms' service, it typically requires its students to submit their written assignments via a 'web-based system available at www.turnitin.com or via an integration between Turnitin and a school's course management system.'").

165. A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008).

166. *Middle & High School*, TURNITIN, http://perma.cc/7D3D-Q8ZY (last visited Nov. 21, 2014).

167. *iParadigms*, 562 F.3d at 635 (summarizing the process of student enrollment in Turnitin, whereby students must first consent to participation by agreeing to the terms of Turnitin's blanket "Clickwrap Agreement"). It is debatable whether the students' consent to enrollment is actually meaningful, since "failure to do so would result in a grade of 'zero' for [a student] assignment" under schools' policies. *Id.*; *see also* Second Amended Complaint for Copyright Infringement at 7, A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008), 2007 WL 2406537 (arguing that student plaintiffs' consent to the "Clickwrap Agreement" was made under duress); Julie D. Cromer Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. VA. L. REV. 431, 437–39, 453–55 (2010) (asserting the full copyrights of young authors and commenting on the dangers they face from online clickwrap agreements to involuntarily give up copyrights, citing *iParadigms* as an example).

168. *iParadigms*, 562 F.3d at 634 ("The Turnitin system gives participating schools the option of 'archiving' the student works. When this option is selected, Turnitin digitally stores the written works submitted by students 'so that the work becomes part of the database used by Turnitin to evaluate the originality of other student's works in the future.'").

169. *Answers to Questions Students Ask About Turnitin*, TURNITIN, http://perma.cc/8S2F-VG9B (last visited Nov. 21, 2014).

Turnitin's claim that its archive constitutes a fair use of student papers.[170] Specifically, against the claim that archiving student papers advances an educational purpose under factor one, the plaintiffs in *iParadigms* argued that Turnitin was making commercial use of student works.[171] Since Turnitin collects fees from participating schools and does not add any new content when archiving student works, the plaintiffs argued that factor one should weigh against a finding of fair use for Turnitin.[172]

In 2008, the district court granted summary judgment in Turnitin's favor, finding that Turnitin made fair use of the students' works. On appeal, the Fourth Circuit favorably cited the district court's fair use analysis.[173] Acknowledging that Turnitin "intend[ed] to profit from its use of the student works,"[174] the Fourth Circuit nonetheless found factor one to weigh *strongly* in favor of Turnitin. The court did not ascribe the educational purpose of the schools onto Turnitin, but emphasized the affiliation between the service provider and the schools in finding "highly transformative" use.[175] And because Turnitin "provides a substantial public benefit through the network of educational institutions using Turnitin," the interests under factor one weighed so much in favor of Turnitin as to offset all other factors, including the students' interest in future uses of their work.[176]

170. *See, e.g.*, TyAnna K. Herrington, INTELLECTUAL PROPERTY ON CAMPUS: STUDENTS' RIGHTS AND RESPONSIBILITIES 92–100 (2010) (listing alternative anti-plagiarism methods that educators have proposed to services like Turnitin, and discussing why these services "may not well serve the interests of educators who use them and how their use could be both unethical and infringing of students' work").

171. *Id.* Courts have relied heavily on a presumption of non-fair use when confronted with a commercial use, established in *Sony Corp. of America v. Universal City Studios, Inc*., 464 U.S. 417 (1984). This presumption has since been overturned. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1993) (holding that while defendant's commercial use disfavors a finding of fair use, the overall transformative nature of defendant's derivative song may still weigh factor one in favor of defendant). Although no longer outcome-determinative, courts still weigh commercial use against a finding of fair use under the factor one analysis. *See, e.g.*, Basic Books v. Kinko's Graphics Co., 758 F. Supp. 1531 (S.D.N.Y. 1991).

172. A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008); *see also* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995) (finding that archiving of scientific articles by researchers at Texaco was not a transformative purpose and not fair use).

173. *iParadigms*, 562 F.3d at 638.

174. *Id.*

175. *Id.* at 638–40.

176. *Id.* at 638–44 ("[T]o the extent that [Turnitin's] use would adversely affect plaintiffs' works in this particular market, we must consider the transformative nature of the use."). The Fourth Circuit's treatment of factor four is not entirely clear, but it seems to indicate that the students' interests in their works—either through selling their works or submitting them as writing samples—would have weighed against a finding of fair use. *Id.* at 644–45. The court postulated that Turnitin's archival of student papers would impair the high school student market for unpublished term papers and essays. *Id.* However, the court justified its finding of fair use by describing the market harm as a permissible suppression. *Id.*; *see also* Campbell, 510 U.S. at 598 (holding market suppression as permissible under fair use). In addition, the Fourth Circuit implied in *iParadigms* that students waived the factor four argument by testifying that they would not sell their works. 562 F.3d at 644. As for the students' argument regarding writing samples, the court simply stated that educators who review writing samples would know to expect a previous student work and understand that it could be archived on Turnitin. *See id.* at 645.

The court all but dismissed the students' arguments under factors two and three. On factor two, the court conceded that the student works might be highly creative, but ruled that Turnitin's use was not

The Turnitin decision came as a surprise because courts have explicitly declined to find archival a transformative use.[177] When we consider the Second Circuit's decision in *American Geophysical Union v. Texaco*,[178] the Fourth Circuit's finding of a "highly transformative" purpose in the mere archival of copyrighted work in *iParadigms* comes as a surprise.[179] Like Turnitin, Texaco archived copyrighted writings for future use without contributing new content or seeking permission from rights holders. The rights holders in *Amercian Geophysical Union*, publishers of scientific and technical journals, sued Texaco.[180] In *American Geophysical Union*, the Second Circuit ruled in the rights holders' favor on almost every factor even though it found a thinner copyright interest in the fact-based articles at issue.[181] The most convincing way to square Turnitin's success and Texaco's failure is to distinguish based on the alleged rights-violator.[182] Texaco's commercial interest in archiving was determinative for the factor one analysis.[183] In contrast, because schools requested Turnitin to carry out part of their educational mission, Turnitin won under factor one despite having a commercial interest in archiving student works.[184]

2. Coursepacks Could Be Fairly Reproduced by Universities but Not By Copy Shops

The identity of the alleged rights-violator has also driven fair use analyses in cases involving the unauthorized reproduction of educational materials in school coursepacks. In the coursepacks cases, whether the alleged rights-violator was affiliated with the school has mattered more to courts than whether the rights holder was a student or a professional. In *Basic Books*, the first in this line of cases, Kinko's failed to convince the court that its coursepacks constituted an educational use of copyrighted materials.[185] The *Basic Books* Court concluded that students

related to the creative core since it only compared similarities between student works. *See id.* at 640–42. Under factor three, while the court agreed that Turnitin used the entirety of each student work it archived, it held that archiving the whole work was appropriately limited to the service's electronic comparison purposes. *See id.* at 642.

177. *See* H.R. REP. NO. 94-1476, at 66–72 (1976) (providing guidance on valid educational purpose under § 107).

178. Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994).

179. *iParadigms*, 562 F.3d at 638–40. Also, student works tend to be more expressive and less fact-driven, and thus closer to the core of copyright. *See Campbell*, 510 U.S. at 586 (finding "creative expression" is at the "core" of copyright protection under factor two).

180. *See Am. Geophysical Union*, 60 F.3d at 915.

181. *Id.* at 925 (weighing factor two against the copyright holders, since the articles were mostly factual and therefore outside the core of copyright protection).

182. The Second Circuit held that Texaco could have easily acquired a license through a copyright clearance center. *Id.* at 929. The fourth fair use factor requires a showing of the rights holders' market harm, and the loss of licensing fees in *Am. Geophysical Union* satisfied the requisite showing. *Id.* at 929–31. It would have been just as easy for Turnitin to obtain student permission through a Clickwrap Agreement, though.

183. *See Am. Geophysical Union*, 60 F.3d at 922–23 (finding that Texaco had not archived the works in order to generate profits, but rather to avoid paying a licensing fee).

184. *See supra* note 168 and accompanying text.

185. Basic Books, Inc. v. Kinko's Graphics Co., 758 F. Supp. 1522, 1547 (S.D.N.Y. 1991).

could "no doubt" assert an educational use for the coursepacks, but Kinko's employees could not.[186] After *Basic Books*, other non-school-affiliated copy shops have asserted educational use without success.[187] These cases left open the question of whether an educator or school could make fair use of copyrighted materials in educational coursepacks.[188]

Teachers and schools now have the technology to make and distribute coursepacks without using a print shop. In a 2012 opinion from the Northern District of Georgia, *Cambridge University Press v. Becker*, the court found fair use in coursepacks that were copied and distributed by a university.[189] In *Cambridge University Press*, various book publishers sued Georgia State University officials for promulgating policies that materially contributed to the creation and distribution of allegedly infringing coursepacks over the university's servers.[190] The university defended its faculty's use of copyrighted materials, asserting fair use and other theories.[191] In the forty-eight instances of alleged infringement where the university's sole defense was fair use, the district court found all but five to be fair use.[192] In those five instances, although factor one strongly favored the university, the harm to rights holders' interests was so substantial that it outweighed the educational purpose of the school's use.[193] The district court's decision reveals that while courts are unwilling to allow non-school-affiliate third parties to usurp the educational use claims of a student,[194] a judge might presume the validity of a school's educational use claim.[195]

Discussing why factor one so "strongly favor[ed]" the school, the district court noted that "the facts of this case so clearly meet the criteria of (1) the preamble to fair use factor one, (2) factor one itself *and* because (3) Georgia State is a nonprofit

186. *Id.*

187. *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1388–89 (6th Cir. 1996) (en banc). The defendant in *Michigan Document Services* attempted the same argument that Kinko's made in *Basic Books*, asserting that the coursepacks were educational and fell under fair use. Though in a different circuit, the argument fared no better.

188. *Basic Books*, 758 F. Supp. at 1531 (suggesting that students can "no doubt" assert an educational use of the coursepacks).

189. Cambridge Univ. Press v. Becker (*Cambridge Univ. Press I*), 863 F. Supp. 2d 1190, 1210 (N.D. Ga. 2012).

190. *Id.* at 1201–05.

191. *Id.*

192. Seventy-four instances of alleged contributory infringement survived summary judgment. *See* David Kluft, *The Devil's in the Details: Dissecting the 350-Page Georgia State University Electronic Reserve Copyright Ruling*, TRADEMARK & COPYRIGHT L. BLOG (May 23, 2012), http://perma.cc/P68-J8K2. Ultimately, sixteen claims were denied for plaintiffs' failure to establish copyright ownership, and ten claims were denied as de minimis. *Id.*

193. *Id.*

194. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc) (noting that courts have "'properly rejected attempts by for-profit users to *stand in the shoes*'" of customers who do make educational and noncommercial uses (emphasis added) (quoting William F. Patry, FAIR USE IN COPYRIGHT LAW 420 n.34)).

195. *Cambridge Univ. Press I*, 863 F. Supp. 2d at 1224 ("*Basic Books* and *Michigan Document Services* involved commercial copiers that produced printed coursepacks and sought unsuccessfully to characterize their use of copyrighted materials as noncommercial, nonprofit uses."); *see also* Cambridge Univ. Press v. Patton (*Cambridge Univ. Press II*), 769 F.3d 1232, 1264 (11th Cir. 2014) (same).

educational institution."[196] On October 17, 2014, the Eleventh Circuit reversed the district court's ruling for its overly mechanical application of the fair use factors on whole.[197] However, the circuit court agreed with the district court's analysis under factor one that unauthorized copying of educational materials by a school requires a different fair use analysis than the exact same kind of copying by a commercial print shop.[198] Echoing the words of the district court, the Eleventh Circuit contrasted the Georgia State University coursepacks program with previous cases, where "the court refused to allow the defendants, who were engaged in commercial operations, to stand in the shoes of students and professors in claiming that their making of multiple copies of scholarly works was for nonprofit educational purposes."[199]

The coursepacks cases provide an up-to-date illustration of the difference between courts' treatment of schools and of non-school-affiliated parties. In both the archival and the coursepacks cases, schools and school-affiliated defendants fared better with the educational purpose argument than did unaffiliated parties that made similar secondary use of copyrighted works. The school-affiliated Turnitin won on the issue of fair use based on the educational purpose of its services, but *American Geophysical Union* and the coursepacks cases suggest that, without the school policies that authorized Turnitin's archival of student works, a commercial company could not have pierced the high school students' copyright protections. Furthermore, the coursepacks cases highlight the degree of judicial deference to school policies even when the legal rights of non-student writers are implicated, since some judges are willing to turn the tide of precedent when schools are at bar.[200] Considering the extraordinary judicial deference underscoring the decisions that have involved a school as the alleged rights-violator, student reporters should possess all the First Amendment protections of full-fledged professionals against non-school-affiliated subpoenaing parties, *Hazelwood* notwithstanding.

IV. STRENGTHENING STUDENT ACCESS TO FIRST AMENDMENT PRIVILEGE THROUGH SHIELD LAWS

Hazelwood does not bar courts from applying the framework of professional reporters' First Amendment privilege to high school student reporters. It is unlikely that the Supreme Court will decide the issue of a First Amendment high school reporter's privilege anytime soon. While lower courts have made headway on the coverage question of a First Amendment reporter's privilege, they have failed to provide guidelines that offer predictable outcomes for non-traditional newsgatherers such as high school student reporters.[201] Legislative guidance could

196. *Cambridge Univ. Press I*, 863 F. Supp. 2d at 1224.

197. *Cambridge Univ. Press II*, 769 F.3d at 1260.

198. *Id.* at 1263–67.

199. *Id.* at 1264.

200. *See Cambridge Univ. Press I*, 863 F. Supp. 2d at 1239 (finding that a university permissibly uses copyrighted materials unless it has caused substantial economic harm to the copyright holders).

201. *See* Persky v. Yeshiva Univ., No. 01 Civ. 5278 (LMM), 2002 WL 31769704 (S.D.N.Y. Dec. 10, 2002) (privileging undergraduate student journalist); Blum v. Schlegel, 150 F.R.D. 42 (W.D.N.Y.

provide much-needed clarification on the privilege's coverage, just as copyright statutes have clarified the scope of the Intellectual Property Clause. Legislators should make careful drafting choices to avoid under-protecting the rights of high school student reporters, especially student reporters who conduct newsgathering at near-professional levels.

Over the last several years, Congress has seen numerous proposals for a federal shield law.[202] Many of these proposals would exclude high school and college student reporters by making professional employment a threshold requirement.[203] The most recent Congressional proposal—the "Free Flow of Information Act"—was amended after journalists demanded stronger press protections.[204] It now reserves a niche for student reporters in its three-tier definition of "covered journalists."[205] The first tier covers traditional, salaried journalists who gathered the subpoenaed material with intent of public dissemination.[206] The second tier covers career freelancers, former employees of a "news dissemination service" or participants on journalistic media at an "institution of higher education."[207] The final, catchall tier gives judges the discretion to privilege individuals who are not covered under the first two tiers when it "would be in the interest of justice and necessary to protect lawful and legitimate news-gathering activities."[208] The third tier seems coterminous with the scope of a qualified constitutional reporter's

1993) (privileging law school student). However, college and high school students might not be similarly situated with respect to the First Amendment. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (finding university's denial of printing funds to school-sponsored publication with Christian editorial viewpoint impermissible under First Amendment and not justified by the school's scarcity of funds for all educational needs); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) (declining to decide "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level"). *But see* Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005) (applying *Hazelwood* and holding that a university could conduct prior review of its newspaper).

202. Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. (2013); Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013); Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007). None of these proposals were ever enacted. The Free Flow of Information Act of 2007 was passed by the House but was subsequently filibustered in the Senate.

203. WRIGHT & GRAHAM, *supra* note 18.

204. Members of the press criticized an earlier draft of the 2013 bill for under-protecting journalists. *See, e.g.*, *Obama's Media Shield Law Makes Prosecuting Journalists Even Easier*, RUSSIA TODAY (May 17, 2013, 9:16PM), http://perma.cc/F9XK-MKKJ ("[T]here's a strong argument that passing the bill . . . will weaken rights reporters already have and make it easier for the government to get sources from reporters."). The bill was amended in September 2013 to strengthen protections; the amendment passed the Senate on September 12, 2013. On November 6, 2013, the bill placed on the Senate Legislative Calendar, and has not seen any action since then. S. 987, 113th Cong. (2013–14), *available at* http://perma.cc/NE7T-TWVU.

205. Free Flow of Information Act of 2013, S. Rep. No. 113-118, at 14 (2013).

206. S. 987, 113th Cong. § 11(1)(A)(i) (as reported to the Senate, Nov. 6, 2013), *available at* http://perma.cc/FY7W-NQTW (defining a "covered journalist" as an employee, agent or independent contractor for a news dissemination service, and whose primary intent for investigating an event was, at the inception, to procure information for dissemination). The first tier definition mimics the narrow definition of covered persons in the Delaware statute. DEL. CODE ANN. tit. 10, §§ 4320–26 (2014).

207. S. 987 § 11(1)(A)(ii).

208. *Id.* § 11(1)(B).

privilege, [209] and would therefore strengthen a claim of constitutional privilege for student reporters.

If the current federal shield bill does become the first federal shield law in the United States, it would only protect reporters in a narrow set of circumstances—subpoenas issued by a federal actor and arising out of federal causes of action.[210] A student-friendly *state* shield law would strengthen privilege in both state and federal cases, since federal courts look to state law for definitions of privileged persons.[211] West Virginia, the latest state to enact a reporter's shield law, provides a two-tier definition of privileged persons that is similar to the definition in the proposed Free Flow of Information Act.[212] While the first tier requires the reporter to earn a "substantial livelihood" from newsgathering, the second tier allows judges to protect student reporters whose work closely models traditional journalism.[213] Shield laws like the federal bill and the West Virginia statute protect a narrow core of traditional press, but provide a catchall category that gives judges discretion to award privilege to non-traditional reporters based on whether the reporters conducted legitimate journalism and the interest of justice in the subpoenaed material.

This type of shield law would give judges the flexibility to withhold the privilege from leakers, sham newsmen and cyberbullies. At the same time, because the inquiry focuses on the newsgatherer's process and product rather than employment status or income, this type of shield law extends protection to student reporters whose work resembles the work of professional journalists. Wide adoption of such state shield laws would increase a high school student reporter's chances of succeeding on her privilege claim in jurisdictions that do not recognize a constitutional reporter's privilege, as well as in jurisdictions that would not clearly cover student reporters under the constitutional privilege. The greater likelihood of receiving a reporter's privilege would allow young student reporters to continue engaging in high-caliber investigative reporting, reducing the double-bind of risking imprisonment if they protect sources and social stigma if they snitch.

V. CONCLUSION

High school student reporters advance many of the same First Amendment interests as their professional counterparts. In addition, high school press provides information to an underserved community and builds courageous individuals who will shape the future of professional journalism. While it is not certain that a First

209. *See, e.g.*, N.Y. Times Co. v. Gonzales, 459 F.3d 160, 175 (2d Cir. 2006) (favorably citing Department of Justice guidelines stating that "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice").

210. The Free Flow of Information Act does not preempt state law. *See* S. 987 § 2 (limiting privilege to subpoenas before a "federal entity").

211. *See supra* notes 73–74 (discussing Federal Rule of Evidence 501 and federal courts' deference to state definitions of covered journalists).

212. *See* W. VA. CODE § 57-3-10 (LexisNexis 2012).

213. *Id.*

Amendment privilege exists in all jurisdictions, high school student reporters deserve a First Amendment privilege in the jurisdictions where the privilege would be available to a professional reporter, notwithstanding First Amendment speech cases like *Hazelwood*. Courts should recognize the advanced newsgathering that many high school journalists conduct, as well as the stakes involved if student reporters do not receive First Amendment protection from non-school-affiliated parties. Legislatures should also seriously consider adopting more student-friendly shield laws to secure the privilege for high school students who are committed to conducting legitimate journalism.